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No. 73-369

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In the Supreme Court of the United States

OCTOBER TERM, 1973

FIRCH BAKING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 33a-40a) is reported at 479 F. 2d 732. The Board's decision and order (Pet. App. 1a-28a, 29a-32a) are reported at 199 NLRB No. 62.

JURISDICTION

The decision of the court of appeals was entered on May 29, 1973, and a petition for rehearing was denied on July 6, 1973 (Pet. App. 41a). The petition for a writ of certiorari was filed on August 28, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the company refused to bargain in good

faith with its employees before instituting unilateral changes in wages, hours, and working conditions.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 2.

STATEMENT

The Company, a producer and distributor of baked goods, was a party to a collective bargaining agreement with the Allied and Technical Workers Union, which was to run until January 1, 1972 (Pet. App. 2a-3a; A. 150a-151a, 353a).[1] On November 10, 1971, pursuant to a request by the Union, the parties began formal negotiations for a new contract, with the Union making proposals for changes (Pet. App. 3a-4a; A. 36a, 254a). The Company rejected the Union proposals, but, in subsequent meetings and communications, advanced no economic proposals of its own until December 27 (Pet. App. 19a; A. 51a).

On December 27, the Company set forth its economic proposals in a five-page outline, which was distributed to all members of the bargaining unit on the same day it was delivered to employee members of the Union negotiating committee (Pet. App. 11a-12a; A. 118a-120a, 368a, 372a). The Union's chief negotiator, who was not an employee, received a copy of the outline on the 29th and immediately notified the Company, by telegram, of his willingness to meet and discuss the proposals (Pet. App. 13a; A. 51a, 377a).

On December 30, the Company distributed a letter to all employees in the unit stating that:

[1] "A." references are to the Appendix in the court below.

> In the event that the union does not accept our fair, firm offer by the time that the contract expires [midnight, January 1, 1972], we have no alternative but to make our fair, firm offer to you directly. And, of course, we sincerely hope that you will accept it and continue on the job. [Pet. App. 14a; A. 378a.]

The same day, a negotiating meeting was held, at which the Union's chief negotiator stated that he was rejecting the economic offer outlined by the Company. He nonetheless continued to discuss various parts of the offer with the Company negotiators (Pet. App. 14a-15a; A. 51a-52a, 266a-267a). The Union also agreed to two of the Company's non-economic proposals (Pet. App. 15a; A. 53a, 213a).[2]

The next day, December 31, the Company, for the first time, presented the Union with proposed contract provisions embodying its offer (Pet. App. 15a; A. 51a). However, the Company did not furnish copies of the master insurance plan, which was referred to in the offer and which contained details of the medical, surgical, and term life insurance coverage which the Company proposed to substitute for the existing plan (Pet. App. 15a; A. 34a, 270a). The parties reviewed the Company's contract proposal in detail, the Union agreeing to some provisions, both economic and noneconomic (Pet. App. 15a-16a; A. 243a-244a, 252a-253a). The meeting ended at 11:45 p.m. on December 31 (Pet. App. 16a; A. 274a). At midnight, the following night, January 1, 1972, the Company put all the provisions of its offer into effect (Pet. App. 16a; A. 55a-56a).

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[2] The Company had advanced these proposals on December 15 (Pet. App. 15a).

The Board found that the Company's December 30 letter had made "a promise to [its] employees that a specified wage increase would be granted," and that, "[i]nasmuch as the employees were promised the wage increase irrespective of its acceptance or rejection by the Union, before the increase had even been presented to the Union, therefore the wage increase was in fact a firm decision which removed the element of bargaining." Accordingly, the Board concluded that "no good-faith bargaining impasse had resulted when the [Company]" unilaterally effectuated its economic proposals on January 2, 1972, and that thus the Company's action violated Sections 8(a)(5) and (1) of the Act. (Pet. App. 30a-31a, n. 3.) The court of appeals enforced the Board's order in full (Pet. App. 33a-40a).

ARGUMENT

The question stated in the petition—whether an employer may put into effect new terms and conditions of employment "that have previously been offered to, and rejected by, the union," even though an impasse in the bargaining has not occurred (Pet. 2)—is not presented on this record. The Board found that the Company promised a wage increase to the work force "before the increase had even been presented to the Union." The court below specifically accepted this finding, holding that the case presented no occasion to consider "whether a company may unilaterally institute changes in wages and other conditions of employment without bargaining to impasse * * *. [I]n our view this is not an 'impasse case' at all. It more aptly might be called a 'poisoned fountain case'; the fountain was poisoned before it ever began to flow" (Pet. App. 40a). The only question for review, therefore, is whether the findings of the Board are supported by substantial evidence. Such an

issue does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490-491. In any event, as shown in the Statement (pp. 2-4), the Board's findings are amply supported by the record, and its legal conclusions are in accord with settled authority. *National Labor Relations Board* v. *Katz,* 369 U.S. 736; *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.,* 337 U.S. 217.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1973.